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ABSTRACT

One of a series of secondary level teaching units presenting case studies with pro and con analysis of particular legal problems, the document presents a student's lesson plan, a teacher's lesson plan, and a lawyer's lesson plan on unconscionable clauses in sales contracts. The unit acquaints students with the operation of sales contracts and commercial transactions, while providing them with an appreciation for the significance of "freedom of contract." Although similar in content, student and teacher lesson plans are presented separately to facilitate independent and small group work by students and to provide additional background information for teachers. Prior to a lawyer's visit to the classroom, students examine hypothetical case studies to determine whether or not a contract exists in each case. Students then discuss a case study with a visiting lawyer, study a list of deceptive sales practices, and read the lyrics of a song entitled "Smiling Faces" (Whitfield & Strong) from the point of view of a consumer. In a final activity, students engage in a role play of a case concerned with sales contracts. Teacher materials include information about section 2-302 of the Uniform Commercial Code, a reading on court systems, and a simplified view of the federal and California court structures. The lawyer's lesson plan presents further questions and discussions concerning case studies, information about the Uniform Commercial Code, and additional hypothetical case studies. (LH)

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WITH INTEREST IT COMES TO ....

Unconscionable Clauses in Sales Contracts

A Student's Lesson Plan

Prepared by Estelle Howard
Richard Weintraub
1977

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WITH INTEREST IT COMES TO ....
(Unconscionable Clauses in Sales Contracts)

STUDENT'S LESSON PLAN

INTRODUCTORY UNIT

This activity is developed to give the student an understanding of what a contract is and what obligations and protections each party acquires when signing a contract.

The teacher has placed a contract form on your desk. Read it carefully so that you understand what obligations you have undertaken in order to receive the agreed upon exchange that is stated in the contract. After you have read the contract, decide whether or not you will sign it.

Read the following questions and then consider the facts in the hypothetical incidents below. Decide whether or not a contract exists in each case. What are your reasons for your decision?

QUESTIONS

A. What is a contract?

B. What elements are necessary to have a contract?

C. Must contracts be in writing to be enforceable in court?

HYPOTHETICAL CASES*

CASE 1

John has a motorcycle that he wants to sell. He offers it to Bill for $300. Bill thinks $300 is too much for the cycle, but he would like to buy it. He makes a counter offer of $200.

CASE 2

Dan loves candy bars. He sees Chris has a bag of chocolate bars and says to her, "I would pay $50 for a Hershey Bar." Chris reaches into her bag, pulls out a Hershey Bar, slaps it into Dan's hand and says, "Pay me."

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* Basic Contract Law, pgs. 261, 263, 265, 267, Golden Gate Law Review, Winter, 1972, Vol. 2, No. 1.

CASE 3

Bill tells Charlie that he thinks he will sell his house. Charlie offers to buy the house for $ 25,000, and next day bill and his wife decide to sell it to Charlie for his offered price. Bill phones Charlie and tells him that he has accepted his offer of $ 25,000.

CASE 4

Robyn tells Carl that if he will help her rob the city bank, he will get half the money. Carl agrees, and they rob the bank the next day. Robyn, however, does not pay him anything and instead goes to Nevada and loses all the money gambling.

Questions for cases 1 - 4

A. Is there a contract ? Is it legally enforceable ?

CASE 5

Lorraine bought a hair dryer at a beauty supply store. The sales person told her she could bring it in for servicing if anything went wrong anytime within a year. About three months after the purchase, the heat control switch wouldn't work. Lorraine took it back to the store. She was told that the store had been sold and that the new owner was not responsible for any repairs to the dryer.

Questions for Case 5

A. Did Lorraine have a contract with the original store owner? Why? Why not? If so, what kind of agreement was it?

B. Do you think the new owner should be responsible for the contracts made by the original owner? Why not?

C. Would it have made any difference if Lorraine had had a written agreement with the original owner rather than an oral agreement? Do you think the law favors written contracts over oral agreements? Why?

D. Is there a contract? Is it legally enforceable?

CASE 6

Frank bought a tape deck for his car for half price as it was a discontinued model. The sales slip he received at the time of purchase had written across it, " the seller makes no guarantees either express or implied with regard to this item. This tape deck is sold as-is." About four weeks later the tape deck did not work.

Questions for Case 6

A. Is there a contract? Is it legally enforceable?

B. Can Frank return the tape deck either for repairs or for return of his money?

WITH INTEREST IT COMES TO ....

CONTRACT FOR AN "A" GRADE*

AGREEMENT made this ____ day of _____, 19__, between _____ Education Corporation, having a principal place of business at _____, hereinafter referred to as party of the first, and _____, of _____ _____, hereinafter to be known as party of the second.

The party of the first does hereby warranty and promise that the party of the second shall receive an "A" in this class, the subject matter of which is _____ to be taught in room _____ in the _____ semester of 19__. Provided that the party of the second does hereby assign and transfer to the party of the first such party's rights, title and interest in all property, including the very person of the party of the second, within the province and purview of the aforementioned classroom. Provided also that such party of the second does hereby authorize the party of the first to do every act and thing necessary to collect and discharge the same. Provided further that any liability of the party of the second pursuant hereto shall not limit, diminish, extinguish or effect in any other manner or form any indulgence, compromise, settlement, extension or variation of the terms

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* Developed by Richard Krieger, 1973.

of this agreement which may or may not be made at any future time or place at the sole discretion of the party of the first or his/her assigns and agents, and which may be made with or without the foreknowledge of, or notice to, the party of the second.

IN WITNESS WHEREOF, the parties have executed this agreement on the day and year first above written.

By _____ By _____
teacher student

WITH INTEREST IT COMES TO ....

LAWYER-IN-THE-CLASSROOM UNIT

Read the case below carefully. Consider all the facts and then study the questions and be prepared to discuss the issues with the visiting lawyer.

CASE

On May 1, 1970, Mary Johnson, a 32-year-old woman with three children opened a charge account at Spend-A-Lot Appliance Store. She signed a contract which stated that whenever she buys an item on credit, the Department Store will have a "security interest" in that item and in all items previously purchased on credit from the store by her. Because of the security interest, if she fails to make a payment the contract states that the store will be able to repossess all items she has bought on credit from the store.

She made the following purchases:

Date	Item	Price
May 5, 1978	Washing Machine	$ 350
August 8, 1978	TV	240
December 20, 1978	Radio	85
September 3, 1980	Refrigerator	385
June 16, 1981	Dishwasher	125
		$1,185

She made regular payments on her account, and on September 1, 1981, the balance she owned was $110. However, she missed the payment due September 15, 1981, and the store immediately brought action for repossession of the washing machine, TV, radio, refrigerator and dishwasher.

QUESTIONS

A. Should the store be entitled to possession of all items? If so, why? If not, why not?

B. What arguments would you make to support the terms of the contract if you were the store owner?

C. What arguments would you make about the "fairness" of the contract if you were Mary Johnson?

D. Would you feel the same about repossession of all the items if Mary Johnson were a wealthy person? Why? Why not? A member of a minority group? A bluecollar worker?

E. Do you think that State Legislature should protect individual citizens against "sharp practices" by companies that sell merchandise on "time"? Why? Why not? What protections should be provided the seller of the merchandise against "deadbeats"?

F. If you were the Court, how would you rule in this case? Would you enforce the entire contract? Reject the clause about repossession of all items? What would be your reasoning?

FOLLOW-UP UNIT #1

Study the list of Deceptive Sales Practices and discuss with the class your feelings about these kinds of sales techniques. Do you know of other deceptive practices used to get people to buy things?

After you have studied the list, read the lyrics to the song, "Smiling Faces", from the point of view of a consumer. Discuss with the class the implications of the song, using the questions as a springboard to your discussion.

DECEPTIVE SALES PRACTICES

Although most sellers are honest and do not resort to methods that are designed to deceive the customer, there are those who do use sales techniques that hoodwink the consumer into buying something that is not exactly what it appears to be. The consumer should know what these deceptive practices are so that they can protect themselves against them.

BAIT AND SWITCH: This technique involves advertising an item as a 'bargain' so as to draw the customer into the store. The salesperson then talks down the advertised item and switches the consumer's interest to a higher priced item.

DECEPTIVE PRICING: The storekeeper advertises a big sale, stating that certain items that were formerly priced at so many dollars is now "only $---" (less). The fact that makes this a phony sale is that the item never was priced at the higher price. The seller is trying to trick the buyer into believing he/she is getting a good deal. This practice is illegal.

DECEPTIVE CONTESTS: When a consumer is advised that he/she has won a free prize and then is told that in order to get the free prize, he/she has to buy something else, the consumer is a victim of a phony contest. It is illegal to use the word "free" and then require that the consumer do something in order to get the free item.

FALSE DESCRIPTION OF GOODS OR SERVICES: A seller gives the buyer a description of an item that is not true, for example, that a purse is real leather when it is in fact imitation. A consumer should be sure that each item he/she purchases has a label that describes the item.

WITH INTEREST IT COMES TO ....

FALSE DESCRIPTION OF SERVICES: Many trade schools, job training schools, correspondence courses, etc. promise to train people for jobs, and place them in such job when the course is completed, but have neither the intention nor capability of fulfilling such contract. A person should check out the promises of such training schools before signing a contract.

PUFFING: Puffing is exaggeration of a product's worth and the buyer should be careful when making a purchase not to rely upon such puffing as a true description of the goods or that such statement is a guarantee.

WITH INTEREST IT COMES TO .....

SMILING FACES

By Norman Whitfield and Barrett Strong*

Smiling faces sometimes pretend to be your friend
Smiling faces show no traces of the evil that lurks within
Can you dig it?
Smiling faces, smiling faces sometimes
They don't tell the truth
Smiling faces, smiling faces tell lies
And I've got proof.

Let me tell ya
The jokers hate the eyes cause the eyes don't lie
They never
Remember a smile is just a frown turned upside down my friend
So hear me when I'm saying
Smiling faces, smiling faces sometimes
They don't tell the truth
Smiling faces, smiling faces tell lies
And I've got proof.

Beware! Beware of the handshake that hides a snake
Can you dig it? Can you dig it?
I'm a tellin' you
Beware! Beware of the pat on the back
It just might hold you back
Jealousy, Jealousy
Misery, Misery
Envy, Envy
I tell you, you can't see behind
Smiling faces, smiling faces sometimes
Hey, they don't tell the truth
Smiling faces, smiling faces tell lies
And I've got proof.

Hey your enemy won't do you no harm
Cause you know where he's coming from
Don't let the handshake and the smile fool ya
Take my advice I'm only trying to school ya
Smiling faces, smiling faces sometimes
They don't tell the truth
Smiling faces, smiling faces tell lies
And I've got proof.

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QUESTIONS

A. Do you agree with the lyrics? What do they tell you, the consumer, about your position in the marketplace?

B. Do you find yourself making judgments about people based on their "Faces", "Smiles", "Appearance", "Body Language"? Do you feel that you can trust someone because of what he/she says or does?

C. Can you apply any of the deceptive sales practices described to these lyrics? Which ones? How do you think the lyrics say what is said in the descriptions of these sales practices?

D. Keeping in mind both the lyrics and the several sales practices described, what do you think a consumer can, or should, do to protect him/herself against such deception?

E. Do you believe that in the long run consumers would benefit if they were aware of the ways they are deceived and knew what to do to protect themselves? Explain your reasons.

FOLLOW-UP UNIT #2

This class will engage in a role-play simulation of a case concerned with a sales contract. The taking will simulate the courthouse trial, taking the roles of the judge, defendant's attorney and the plaintiff's attorney.

Use the information you gained from the class discussion with the attorney on Day Two as the source for your arguments and decisions.

Instructions For The Role-Play

The class will be divided into three groups:

Group I - Attorney for the Plaintiff

Group II - Attorney for the Defendant

Group III - Judge

Each group will appoint a secretary to keep a record of the arguments the group develops for pleading the case. The secretary will present the arguments for his particular group before the judge (Group III).

After the Attorney for the Plaintiff and the attorney for the Defendant have made their arguments, the Judge shall evaluate the facts and supporting arguments for or against the contract and/or the clause in the contract that is objectionable.

CASE

(This simulation is developed from the case Jones v. Star Credit Corp., S.Ct. NY, 89 Mis.2d. 189, 298 N.Y.S. 2d 264 (1969).)

On August 31, 1965, the plaintiffs, who are welfare recipients, agreed to purchase a home stereo center unit for $900 as a result of a visit from a salesman representing Your Shop At Home Service, Inc. With the addition of the time credit charges, credit life insurance, credit property insurance, and sales tax, the purchase price totalled $1,234.80. Thus far the plaintiffs have paid $619.88 toward their purchase. The defendant claims that with various added credit charges paid for an extension of time there is a balance of $819.81 still due from the plaintiffs. The undisputed proof at the trial established that the stereo unit, when purchased, had a maximum retail value of approximately $300.

THE QUESTION

The question is whether this transaction and the resulting contract could be considered unconscionable (sales practices that are so greatly unfair that a court will not permit them) within the meaning of Section 2-302 of the Uniform Commercial Code.

WITH INTEREST IT COMES TO ....

Unconscionable Clauses in Sales Contracts

A Teacher's Lesson Plan

Prepared by Estelle Howard
Richard Weintraub
1977

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TEACHER'S LESSON PLAN

INTRODUCTORY UNIT

The introductory activity of this plan is developed to give the student an understanding of what a contract is and what obligations and protections each party acquires when signing a contract. This short lesson will provide the students with some basic information about contract law so that they can enter into discussion with the lawyer.

Place on each student's desk a copy of the contract that is included in this unit. Using various ruses, such as soft sell, intimidation, plea to conformity, etc., convince the students that it is to their advantage to sign it.

Collect contracts and have one of the students divide the contracts into those signed and not signed. First ask the students who signed the contract to give an explanation of what they signed. Second, ask a few of the students who did not sign, if any, what their reasons were for not signing.

The teacher should make note of the fact that in signing the contract, the student assigns to the teacher complete rights over his/her body and soul.

After this exercise, discuss the general field of contracts with the class. The following questions can be used to stimulate discussion.

QUESTIONS AND INFORMATION FOR THE TEACHER

A. What is a contract?

A contract is a promise or set of promises for which the law gives a remedy if one of the parties to the agreement breaks his promise. If there is a contract, the law recognizes a duty on each person making a promise to fulfill that which he promises.

B. What elements are necessary to have a contract?

1. An offer (an offer is a statement, oral or written, that a person making the offer will do a certain act if the person to whom it is made will do what is asked in return)

2. An acceptance (an acceptance occurs when someone to whom the offer is made agrees to its exact terms and indicates his acceptance to the person who made the offer)

3. Consideration (consideration is some agreed-upon exchange which the law deems sufficient to support contractual rights and obligations. The agreed-upon exchange may consist of an act, a forebearance to act, or a promise to act)

C. Must contracts be in writing to be enforceable in court?

An oral agreement entered into is a contract and is enforceable in court. However, there are several agreements that must be in writing to be enforced in courts.

1. An agreement that, by its terms, is not to be performed within a year from the making must be in writing and signed by the parties against whom the enforcement is sought.

2. An agreement for the sale of real property must be in writing and signed by the party seeking to enforce the contract.

3. An agreement for the sale of any goods for the price of $500 or more must be in writing and signed by the party against whom enforcement is sought.

Present the following incidents* to the class. Ask the students to consider whether or not a contract exists between the parties and the reasons why a contract does or does not exist.

CASE 1

John has a motorcycle that he wants to sell. He offers it to Bill for $300. Bill thinks $300 is too much for the cycle, but he would like to buy it. He makes a counter offer of $200.

A. Is there a contract? Is it legally enforceable?

Information For The Teacher

John and Bill have not entered into a contract. John made an offer to Bill, who did not except the offer, and made a counter offer for the cycle. The acceptance must be a mirror of the offer.

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* Basic Contract Unit, pgs. 261, 263, 265, 267, Golden Gate Law Review, Winter, 1972, Vol. 2, No. 1

CASE 2

Dan loves candy bars. He sees Chris has a bag of chocolate bars and says to her, "I would pay $50 for a Hershey Bar." Chris reaches into her bag, pulls out a Hershey Bar, slaps it into Dan's hand and says, "Pay me."

A. Is there a contract? Is it legally enforceable?

Information For The Teacher

The law would not force Dan to pay the $50. Offers must be made seriously and not in fun or jest. If the person hearing the offer knows it is a joke, he cannot accept it and thereby create a contract.

CASE 3

Bill tells Charlie that he thinks he will sell his house. Charlie offers to buy the house for $25,000, and the next day Bill and his wife decide to sell it to Charlie for his offered price. Bill phones Charlie and tells him that he has accepted his offer of $25,000.

A. Is there a contract? Is it legally enforceable?

Information For The Teacher

Since at this point there is no writing signed by the party against whom enforcement is sought, the agreement is not enforceable if one of the parties changes his mind since the sale would be for a price of more than $500.

CASE 4

Robyn tells Carl that if he will help her rob the city bank, he will get half the money. Carl agrees, and they rob the bank the next day. Robyn, however, does not pay him anything and instead goes to Nevada and loses all the money gambling.

A. Is there a contract? Is it legally enforceable?

Information For The Teacher

Even though there is an offer and an acceptance, the law does not enforce contracts with an illegal purpose in mind. If the object of the contract is illegal, then the contract itself is void.

CASE 5

Lorraine bought a hair dryer at a beauty supply store. The salesperson told her she could bring it in for servicing if anything went wrong anytime within a year. About three months after the purchase, the heat control switch wouldn't work. Lorraine took it back to the store. She was told that the store has been sold and that the new owner was not responsible for any repairs to the dryer.

A. Did Lorraine have a contract with the original store owner? Why? Why not? If so, what kind of agreement was it?

B. Do you think the new owner should be responsible for the contracts made by the original owner? Why? Why not?

C. Would it have made any difference if Lorraine had had a written agreement with the original owner rather than an oral agreement? Do you think the law favors written contracts over oral agreements? Why?

D. Is there a contract? Is it legally enforceable?

Information For The Teacher

Yes, there was an oral contract. However the oral contract was between Lorraine and the original owner. The new owner is not responsible for contracts made between other persons.

CASE 6

Frank bought a tape deck for his car for half price as it was a discontinued model. The sales slip he received at the time of purchase had written across it, "the seller makes no guarantees either express or implied with regard to this item. This tape deck is sold as-is." About four weeks later the tape deck did not work. Can Frank return the tape deck either for repair or for return of his money?

A. Is there a contract? Is it legally enforceable?

Information For The Teacher

Yes. This is a contract. It is enforceable because the clause across the sales slip is a disclaimer clause and limits the seller's liability and responsibility for any warranties. A disclaimer that is clearly visible and easy to understand is recognized by the courts.

CONTRACT FOR AN "A" GRADE*

AGREEMENT made this ____ day of _____, 19__, between _____ Education Corporation, having a principal place of business at _____, hereinafter referred to as party of the first, and _____, of _____ _____, hereinafter to be known as party of the second.

The party of the first does hereby warranty and promise that the party of the second shall receive an "A" in this class, the subject matter of which is _____ to be taught in room _____ in the _____ semester of 19__. Provided that the party of the second does hereby assign and transfer to the party of the first such party's rights, title and interest in all property, including the very person of the party of the second, within the province and purview of the aforementioned classroom. Provided also that such party of the second does hereby authorize the party of the first to do every act and thing necessary to collect and discharge the same. Provided further that any liability of the party of the second pursuant hereto shall not limit, diminish, extinguish or effect in any other manner or form any indulgence, compromise, settlement, extension or variation of the terms

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* Developed by Richard Krieger, 1973.

of this agreement which may or may not be made at any future time or place at the sole discretion of the party of the first or his/her assigns and agents, and which may be made with or without the foreknowledge of, or notice to, the party of the second.

IN WITNESS WHEREOF, the parties have executed this agreement on the day and year first above written.

By _____ By _____
teacher student

GLOSSARY

ACCEPTANCE: Agreeing to an offer and becoming bound to the terms of a contract.

AGREEMENT: An intention of two or more persons to enter into a contract with one another combined with an attempt to form a valid contract. An agreement may include the language used plus background facts and circumstances. A contract.

CLAUSE: A single paragraph, sentence or phrase.

COMPROMISE: To adjust or settle by mutual concessions.

CONSIDERATION: The reason or main cause for a person to make a contract; something of value received or promised to induce a person to make a deal.

DISCRETION: Power to act within general guidelines, but without either specific rules to follow or the need to completely explain or justify each decision or action.

EXTENSION: A lengthening of time; for example: in the term of a lease or in the time a person may pay a debt without extra payment.

FOREKNOWLEDGE: Something known beforehand.

INDULGENCE: An extension of time for payment or performance granted as a favor.

OFFER: A proposal to make a deal. It must be communicated successfully from the person making it to the person to whom it is made and it must be definite and reasonably certain in its terms.

REMEDY: The way a right is enforced or satisfaction for a harm done is received; the means by which a violation of rights is prevented, redressed, or compensated.

SECURITY INTEREST: Any right in property that is held to make sure money is paid or that something is done.

SETTLEMENT: An agreement about a debt, payment of a debt, or disposition of a lawsuit.

UNCONSCIONABLE: Sales practices that are so greatly unfair that a court will not permit them.

WITH INTEREST IT COMES TO ....

WARRANTY: A statement or other representation (written description, etc.) made by a seller to a buyer as part of the sale as to the type, quality, ownership, use, etc. of the goods. Any promise that certain facts are true.

LAWYER-IN-THE-CLASSROOM UNIT

Copy and distribute Day Two material in the Student's Lesson Plan. Ask the students to study the facts in the case and the questions that follow so they will be prepared to discuss the issues with the lawyer.

CASE

On May 1, 1970, Mary Johnson, a 32-year-old woman with three 3 children opened a charge account at Spend-A-Lot Appliance Store. She signed a contract which stated that whenever she buys an item on credit, the Department Store will have a "security interest" in that item and in all items previously purchased on credit from the store by her. Because of the security interest, if she fails to make a payment the contract states that the store will be able to repossess all items she has bought on credit from the store.

She made the following purchases:

Date	Item	Price
May 5, 1970	Washing Machine	$ 350
August 8, 1970	TV	240
December 20, 1970	Radio	85
September 3, 1971	Refrigerator	385
June 16, 1973	Dishwasher	125
		$1,185

She made regular payments on her account, and on September 1, 1973, the balance she owned was $110. However, she missed the payment due September 15, 1973, and the store immediately brought action for repossession of the washing machine, TV, radio, refrigerator and dishwasher.

QUESTIONS

A. Should the store be entitled to possession of <u>all</u> items? If so, why? If not, why not?

B. What arguments would you make to support the terms of the contract if you were the store owner?

C. What arguments would you make about the "fairness" of the contract if you were Mary Johnson?

D. Would you feel the same about repossession of all the items if Mary Johnson were a wealthy person? Why? Why not? A member of a minority group? A bluecollar worker?

E. Do you think that State Legislature should protect individual citizens against "sharp practices" by companies that sell merchandise on "time"? Why? Why not? What protections should be provided the seller of the merchandise against "deadbeats"?

F. If you were the Court, how would you rule in this case? Would you enforce the entire contract? Reject the clause about repossession of all items? What would be your reasoning?

FOLLOW-UP UNIT #1

For the Follow-Up Unit the teacher is given the option of using "Smiling Faces" and/or the Jones v. Star Credit Corp. role simulation. If the teacher decides to use the role-play, it is suggested that one day be given the students to prepare their case and one day to be given for presentation of the case before the judge. This also allows Group III an opportunity for deliberation on their decision.

Instructions For The Teacher

Copy and distribute material from Follow-Up Unit #1 in the Student's Lesson Plan. This will include Deceptive Sales Practices, the lyrics, "Smiling Faces", and the list of questions.

Discuss the various items listed as deceptive sales practices. Then ask the class to read the lyrics, "Smiling Faces", and analyze the meaning of the song lyrics basing your questions and discussion on the questions given in the unit.

DECEPTIVE SALES PRACTICES

Although most sellers are honest and do not resort to methods that are designed to deceive the customer, there are those who do use sales techniques that hoodwink the consumer into buying something that is not exactly what it appears to be. The consumer should know what these deceptive practices are so that they can protect themselves against them.

BAIT AND SWITCH: This technique involves advertising an item as a 'bargain' so as to draw the customer into the store. The salesperson then talks down the advertised item and switches the consumer's interest to a higher priced item.

DECEPTIVE PRICING: The storekeeper advertises a big sale, stating that certain items that were formerly priced at so many dollars is now "only $---" (less). The fact that makes this a phoney sale is that the item never was priced at the higher price. The seller is trying to trick the buyer into believing he/she is getting a good deal. This practice is illegal.

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PUFFING: Puffing is exaggeration of a product's worth and the buyer should be careful when making a purchase not to rely upon such puffing statements as a true description of the goods or that such statement is a guarantee.

SMILING FACES

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They don't tell the truth
Smiling faces, smiling faces tell lies
And I've got proof.

Let me tell ya
The jokers hate the eyes cause the eyes don't lie
They never
Remember a smile is just a frown turned upside down my friend
So hear me when I'm saying
Smiling faces, smiling faces sometimes
They don't tell the truth
Smiling faces, smiling faces tell lies
And I've got proof.

Beware! Beware of the handshake that hides a snake
Can you dig it? Can you dig it?
I'm a tellin' you
Beware! Beware of the pat on the back
It just might hold you back
Jealousy, Jealousy
Misery, Misery
Envy, Envy
I tell you, you can't see behind
Smiling faces, smiling faces sometimes
Hey, they don't tell the truth
Smiling faces, smiling faces tell lies
And I've got proof.

Hey your enemy won't do you no harm
Cause you know where he's coming from
Don't let the handshake and the smile fool ya
Take my advice I'm only trying to school ya
Smiling faces, smiling faces sometimes
They don't tell the truth
Smiling faces, smiling faces tell lies
And I've got proof.

---

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QUESTIONS

A. Do you agree with the lyrics? What do they tell you, the consumer, about your position in the marketplace?

B. Do you find yourself making judgments about people based on their "Faces", "Smiles", "Appearance", "Body Language"? Do you feel that you can trust someone because of what he/she says or does?

C. Can you apply any of the deceptive sales practices described to these lyrics? Which ones? How do you think the lyrics say what is said in the descriptions of these sales practices?

D. Keeping in mind both the lyrics and the several sales practices described, what do you think a consumer can, or should, do to protect him/herself against such deception?

E. Do you believe that in the long run consumers would benefit if they were aware of the ways they are deceived and knew what to do to protect themselves? Explain your reasons.

FOLLOW-UP UNIT #2

A Role-Play Simulation

Instructions for Role-Play

Copy and distribute the materials for role-play from Student's Follow-Up Unit #2. Assign the roles. Give Group I and Group II time to prepare their case, preferably a class session prior to the presentation. Instruct the class as to procedure.

Divide the class into three groups:

Group I - Attorney for the Plaintiff

Group II - Attorney for the Defendant

Group III - Judge

Each group should appoint a secretary to keep a record of the arguments the group develops for pleading its case. The secretary shall present the arguments before the judge (Group III). Group III will discuss the pleadings and render a decision.

CASE

(This simulation is developed from the case Jones v. Star Credit Corp., S.Ct. NY, 89 Mis.2d. 189, 298 N.Y.S. 2d 264 (1969).)

On August 31, 1965, the plaintiffs, who are welfare recipients, agreed to purchase a home stereo center unit for $900 as a result of a visit from a salesman representing Your Shop At Home Service, Inc. With the addition of the time credit charges, credit life insurance, credit property insurance, and sales tax, the purchase price totalled $1,234.80. Thus far the plaintiffs have paid $619.88 toward their purchase. The defendant claims that with various added credit charges paid for an extension of time there is a balance of $819.81 still due from the plaintiffs. The undisputed proof at the trial established that the stereo unit, when purchased, had a maximum retail value of approximately $300.

THE QUESTION

The question is whether this transaction and the resulting contract could be considered unconscionable (sales practices that are so greatly unfair that a court will not permit them) within the meaning of Section 2-302 of the Uniform Commercial Code.

Information For The Teacher

The Uniform Commercial Code provides in part:

1. If the court as a matter of law finds the contracts or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to void any unconscionable result.

2. When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Section 2-302 of the Uniform Commercial Code enacts the moral sense of the community into the law of commercial transactions. It authorizes the court to find, as a matter of law, that a contract or a clause of a contract was "unconscionable at the time it was made", and upon so finding the court may refuse to enforce the contract, excise the objectionable clause or omit the application of the clause to avoid an unconscionable result.

"The principle", states the Official Comment to this section, "is one of the prevention of oppression and unfair surprise." It permits a court to accomplish directly what heretofore was often accomplished by construction of language, manipulations of fluid rules of contract law and determinations based upon a presumed public policy.

The Court reasoned that there is no doubt, moreover, that this section of the code is intended to encompass the price term of an agreement. In addition to the fact that it has already been so applied (State by Lefkowitz v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S. 2d 303; Frostifresh Crop. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S. 2d 757, revd. 54 Misc. 2d 119, 281 N.Y.S. 964; American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886, 14. A.L.R. 3d 324), the statutory language itself makes it clear that not only a clause of the contract, but the contract in toto, may be found unconscionable as a matter of law. Indeed, no other provision of an agreement more intimately touches upon the question of unconscionability than does the term regarding price.

Fraud, in the instant case, is not present, nor is it necessary under the statute. The question which presents itself is whether or not, under the circumstances of this case, the sale of a freezer unit having a retail value of $300 for $900 ($1,439.60 including credit charges and $18 sales tax) is unconscionable as a matter of law. The court believes it is.

COURT SYSTEMS

There are essentially three ways to categorize our courts. First, there are trial and appellate courts. The job of the trial courts is to find the facts in the case and apply the law to those specific facts. All cases start at the trial court level. The appellate courts focus on the law involved in the case. They do not review questions of fact, which the trial court decides. Appellate courts decide whether the trial judge erred in his interpretation of the law, and thus a case may reach an appellate court only after it has been heard in a trial court.

The second distinction is between criminal and civil courts. In a criminal case (where accused has harmed society and government, representing society, brings a case against him), the government accuses a person of violating a law for which a penalty is provided. It seeks to punish the accused by depriving him of his life, liberty, or property. In a civil case, one may also be deprived of his property (and sometimes his liberty), but for a different reason. The purpose of a criminal trial is to punish the offender; that of a civil trial (one person against another--between private citizens) is to compensate one person for a loss caused by another. Common cases where such liability may be found are automobile accidents, sale of faulty merchandise, and failure to pay rent.

Third, there are both state and federal court systems. (See Chart on Court Structures.) The federal district courts are the trial courts for all cases arising under the laws and Constitution of the United States. State courts have jurisdiction over all cases arising at common law* and equity** as well as all cases under the laws of the states as enacted by their legislatures. Most cases, both criminal and civil, are brought in the state courts. Within the state court system there may be a number of different trial and appellate courts having jurisdiction, or authority, over different types of cases and cases of different degrees of importance. For example, in California trial courts, a case in a large judicial district will be brought in either the municipal court or the superior court. The superior court handles the

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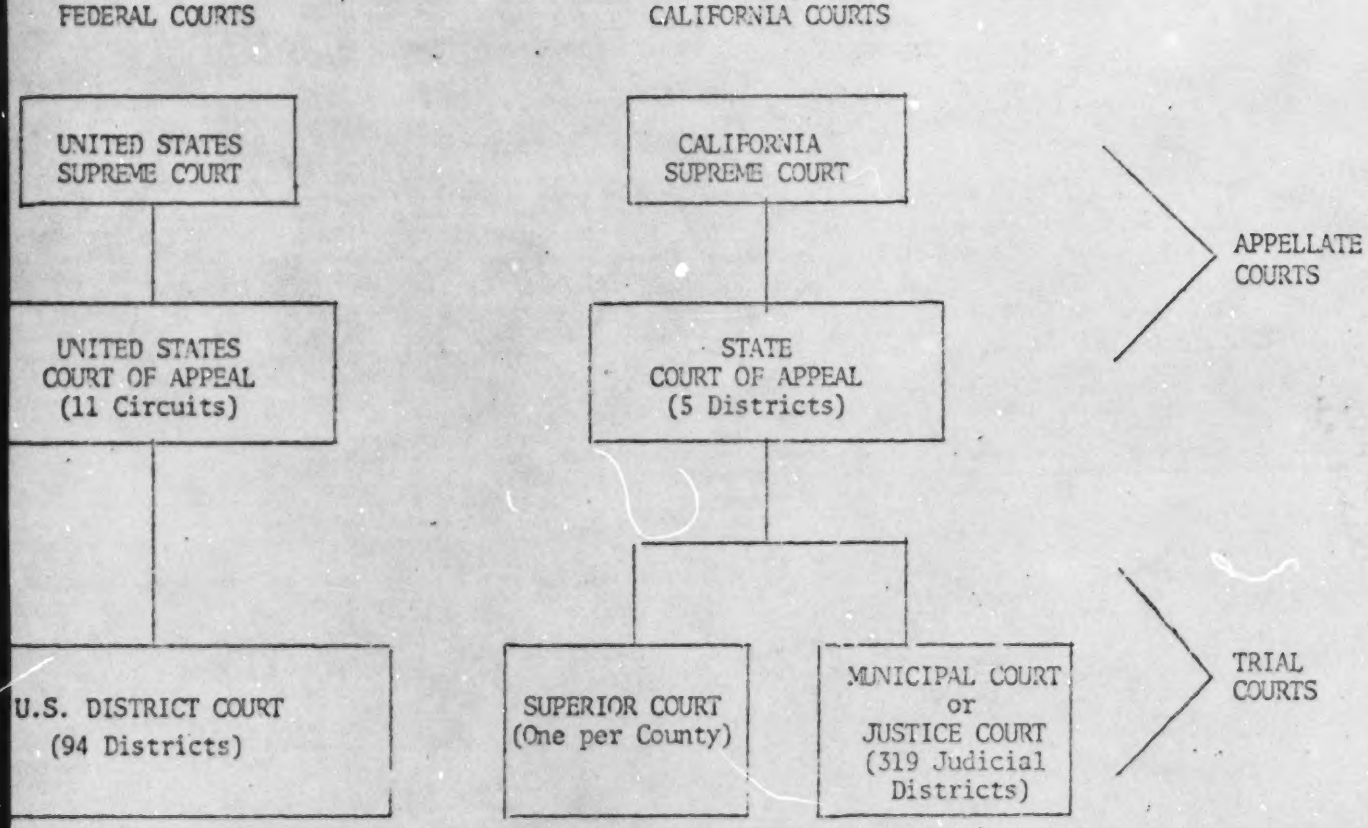
* Common law - Law that has its origins in England and grows from ever-changing custom and tradition. Judge-made law (as opposed to legislature-made law).

** Equity - A court's power to "do justice" where specific laws do not cover the situation.

more important cases--the felonies and civil cases involving over $5,000. But certain types of cases, such as divorce and probate, are brought only in superior court regardless of the amount in controversy. In the smaller judicial districts with a justice court instead of a municipal court, there is a similar division of the cases.

The federal court system has a similar structure. While there are a number of courts that handle only specialized matters, such as the customs court and tax court, most cases start in the federal district courts. Congress has strictly limited the types of cases that fall within the jurisdiction of these courts. One type is the diversity case where each party resides in a different state and the amount in controversy is over $10,000. The other type is a case involving a federal question, that is, one applying the federal constitution, statutes, or treaties.


FEDERAL COURTS
CALIFORNIA COURTS
UNITED STATES SUPREME COURT
CALIFORNIA SUPREME COURT
APPELLATE COURTS
UNITED STATES COURT OF APPEAL (11 Circuits)
STATE COURT OF APPEAL (5 Districts)
U.S. DISTRICT COURT (94 Districts)
SUPERIOR COURT (One per County)
MUNICIPAL COURT or JUSTICE COURT (319 Judicial Districts)
TRIAL COURTS

A SIMPLIFIED VIEW OF THE FEDERAL AND CALIFORNIA COURT STRUCTURES

"WITH INTEREST IT COMES TO . . ."

Unconscionable Clauses in Sales Contracts

A Lawyer Lesson Plan
Prepared by Simon M. Lorne, 1976

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WITH INTEREST IT COMES TO ....
(Unconsionable Clauses in Sales Contracts)

LAWYER'S LESSON PLAN

Area of Law: Commercial

Specific Topic: Unconscionable clauses in sales contracts.

Objective: To acquaint students with the operation of sales contracts and commercial transactions, and to provide them with an appreciation for the significance of "freedom of contract" and an awareness of the limitations of that concept.

CASE

On May 1, 1970, Mary Johnson, a 32-year-old woman with three children opened a charge account at Spend-A-Lot Appliance Store. She signed a contract which stated that whenever she buys an item on credit, the Department Store will have a "security interest" in that item and in all items previously purchased on credit from the store by her. Because of the security interest, if she fails to make a payment the contract states that the store will be able to repossess all items she has bought on credit from the store.

She made the following purchases:

Date	Item	Price
May 5, 1978	Washing Machine	$ 350
August 8, 1978	TV	240
December 20, 1978	Radio	85
September 3, 1979	Refrigerator	385
June 16, 1981	Dishwasher	125
		$1,185

She made regular payments on her account, and on September 1, 1981, the balance she owned was $110. However, she missed the payment due September 15, 1973, and the store immediately brought action for repossession of the washing machine, TV, radio, refrigerator and dishwasher.

QUESTIONS AND DISCUSSIONS

A. Should the Store be entitled to possession of all the items? Students should be encouraged to raise all of the arguments that might be made on either side. The instructor might desire to suggest some of the following arguments to stimulate discussion.

1.

WITH INTEREST IT COMES TO ....

1. From the point of view of the store (and its lawyer) the following arguments might be advanced:

   a. Mary Johnson signed a contract and should be held to its terms.

      She signed the contract and knew she might lose all items purchased if she failed to pay for any one. Nobody made her sign the contract and nobody made her purchase the items. Once she freely decided to do that, she accepted the consequence of a failure to pay.

      (Is this realistic? By 1981 did she remember what the paper she signed in 1978 said? Is it likely that she read the provision? If she objected to the provision, could she have argued with the store clerk and had it changed?)

   b. Even if this contract was not "fair," it is important for society as a whole that contracts be honored.

      For society to function properly, people must be able to rely on agreements. Every year contracts are made by millions of people involving billions of dollars of transactions. People buy things on credit, agreeing to pay later. People go to work for companies that agree to pay them at the end of every week. Companies enter into large construction agreements, agreeing to be paid when they finish their work. People are willing to enter into such transactions only because they trust that the courts will enforce their agreements. If the courts stopped enforcing agreements - or if businesses and businessmen were afraid agreements would not be enforced we would be required to return to a "Cash on Delivery" society. Even if a court thinks this particular contract is not fair, the importance of contracts in society is much more significant and it should be enforced.

      (Is a black-and-white test necessary? Is it possible to void this contract without jeopardizing all contracts? What price are we willing to pay for the "sanctity of contract"?)

[It is particularly important that all aspects of this argument be explored. The student should come to see a specific problem in relation to society as a whole, and to recognize that in some cases (whether or not this is one of them) a relatively "unfair" result may be required for the greater general good.]

c. Even if the store is "bad" and this contract is unfair, the courts should not resolve this sort of problem.

The only problem of Mary Johnson in this case is only a small part of a much larger situation. There are a lot of considerations that may not be seen in this specific case (such as those outlined in (ii) above). It is the sort of problem that should be resolved by a statute, and a court should interfere with the rights of the store only if there is a specific statute providing for relief.

(Is this always true? If a legislature should examine the question, is that more likely to happen if Mary Johnson wins or if the store wins? Who is more able to bring the situation to the attention of the legislature?)

2. From the point of view of Mary Johnson (and her lawyer) the following arguments might be advanced:

a. The clause about repossession of all items is "unconscionable" and should not be enforced.

At the time of her default, Mary Johnson had paid for all items except the dishwasher. It is grossly unfair for the store to be able to repossess other items that she had paid for in full. The contract was a standard, printed form contract that she had no power to alter or negotiate. She probably never read the repossession language. When "form" contracts are used, and one party has no bargaining power, the courts should step in to enforce equitable results.

(Should she have more rights because she didn't read the contract? Would the store have sold the dishwasher without the additional security of the other items? Should courts decide that a contract someone voluntarily signs should be ignored?)

b. This was a "sharp practice" in which the store tried to take advantage of her, and it should not be enforced.

The best way to stop such sharp practices is to refuse to enforce them. Such practices should be stopped any way they can, and the courts, designed to uphold justice, should have no part of helping businesses like this one take advantage of people like Mary Johnson.

B. 1. Ask the students what additional facts they would like to know if they were the store's lawyer? Mary Johnson's lawyer? The judge?

2. Ask the students whether any of the following facts would be significant to them (and discuss whether they should be significant):

a. Mary Johnson, in fact, is quite wealthy and missed the payment on purpose because she was mad at the store.

b. The Clause about repossession is identical to clauses in credit agreement of every store where Mary Johnson lives.

c. The clause about repossession was printed in capital red letters on the front of the agreement.

d. When Mary Johnson went to buy the dishwasher, the store didn't want to sell it to her but she persuaded the manager, saying "if I don't pay for it, our contract says you can take back all the other things I've bought from you."

e. Mary Johnson is black.

f. The store makes most of its sales under contracts similar to the one signed by Mary Johnson, and earns a very small profit (1/2% of sales).

g. The store employs 500 people, most of whom work in the immediate area.

h. The store is a subsidiary of a multinational corporation with consolidated annual sales of $6 billion and net income of $750 million.

i. The multinational corporation also owns three of the competing appliance stores in the area, all of which use the same form of contract as Spend-A-Lot.

j. Mary Johnson used to work for the store many years ago and helped to prepare the language in the contract.

k. Mary Johnson's house has three dishwashers in it.

3. Ask the students:

a. Which of the foregoing factors makes them feel differently about the case?

b. Which of the foregoing factors would cause them to issue a different decision if they were the judge?

c. Can they formulate a generally applicable "rule of law" that would work justice in this case and in cases where additional facts a - k are different?

RESOLUTION OF THE DILEMMA

In many states, Uniform Commercial Code §2-302 would apply. That section provides that a court may refuse to enforce a contract it finds to be "unconscionable" when it was made. Whether this contract would be "unconscionable" may be debated (in light of some of the additional factors). However the case of Williams v. Walker Thomas Furniture Company 350 F.2d 445 (D.C. Cir. 1965), on similar facts, refused to enforce the contract. In that case, §2-302 of the Uniform Commercial Code was not adopted, for fear of making possible a "renegotiation of contracts in every case of disagreement with the fairness of provisions the parties had accepted." However, the reporters also suggested that the presence or absence of the statute might make little or no difference in actual cases given the "broad equity powers which California courts

have always assumed they held." Thus, particularly with the authority of Williams, it is entirely possible that the contract would not be enforced, at least as to items other than the dishwasher.

ADDITIONAL HYPOTHETICALS

If the store successfully repossesses, are Mary Johnson's rights cut off? What responsibilities does the store have?

If the goods are worth $1,500 at the time of repossession? If the goods are worth $50?

Commercial Code §§9501-9508 (adopted in many states) govern defaults under security agreements. Generally (§9504(2)), the debtor is entitled to return of any surplus (after expenses and payment of the debt) and remains liable for any deficiency. Under §9505 the store can be required to sell the collateral and is not allowed simply to keep it in satisfaction of the debt. Any such sale must be in a commercially reasonable manner.

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